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IN THE

Supreme Court of the United States

October Term, 1979

In re:

Multi-Piece Rim Products Liability Litigation.

THE FIRESTONE TIRE & RUBBER COMPANY,

Petitioner,

vs.

JOHN C. RISJORD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

HARVEY M. GROSSMAN,
5900 Wilshire Boulevard,
Suite 1470,
Los Angeles, Calif. 90036,
(213) 934-1133,
Attorney for Petitioner.

(Names and addresses of Attorneys continued on inside front cover)

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Of Counsel:
WILLIAM FREIVOGEL,
ROSS, HARDIES, O'KEEFE,
BABCOCK & PARSONS,
One IBM Plaza, Suite 3100,
Chicago, Illinois 60611,
(312) 467-9300,
and
WILLIAM H. SANDERS,
BLACKWELL, SANDERS, MATHENY,
WEARY & LOMBARDI,
Five Crown Center, Suite 600,
2480 Pershing Road,
Kansas City, Missouri 64108,
(816) 474-5700.

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PETITIONER'S REPLY BRIEF.

Statement of the Case.

Risjord[1] asserts that Firestone omitted facts from its Brief, but the instances cited consist of matters that actually were included in Firestone's Brief[2] or are not of real significance in terms of the issues before this Court.[3]

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[1]We employ the same abbreviations as in our Opening Brief.

[2]For example, Firestone's Brief did not refer to Risjord's Complaint as being grounded *solely* on a theory of intentional tort (see Pet. Op. Br., p. 4, noting Risjord includes an intentional tort theory), although Risjord's inclusion of other theories actually does not aid his position here. Indeed, it is in precisely such a context of multiple-theory pleading coupled with an effort to avoid insurance coverage that the risk of insurer-motivated conduct by trial counsel has been recognized. (See Pet. Op. Br., pp. 37-38)

Firestone's Brief did take note of the vaguely worded "consents and approvals" of referring counsel of the Risjord Plaintiffs (see Pet. Op. Br., p. 42).

Firestone did not rely in its Brief on the Merits on *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) but expressly noted that *Silver Chrysler* had been overruled.

[3]The fact that Firestone was to provide its own defense under Home's excess insurance policy is irrelevant here, except perhaps insofar as it may weaken Home's farfetched challenge to Firestone's standing. (See page 14 note 21, *infra*.) Nor is the basic conflict with which we are concerned here dependent on the extent to which information concerning Firestone did or did not pass between Risjord and Home, or upon the presence or absence of a subject matter nexus between the present litigation and that in which the Risjord firm has represented Home. See page 9, *infra*.

It does not matter how Risjord may proceed in a suit (*Campbell v. Goodyear*) filed (June 29, 1979) after Firestone had questioned the possible motives for Risjord's intentional tort theory in his suit against Firestone. For Risjord to have proceeded otherwise against Goodyear would have been tantamount to an admission by Risjord that Firestone's concerns were well taken.

The mere fact that Home reserved rights in some cases not involving rims or wheels in which Risjord was not counsel does not affect the proceedings here. It is the *combination* of Risjord's role and Home's disavowal that poses the problem.

Nor does it matter whether Home was the sole party represented by Risjord in *Cannova*, since the true depth of the twenty-year relationship between Home and the Risjord firm cannot be measured in terms of Risjord's precise role in a single case.

While Risjord contends that Firestone does not present the "true nature" of his relationship with Home, Risjord fails to cite any inaccuracies in Firestone's account. Instead, Risjord attempts to minimize his relationship to Home by adverting to matters of no real moment. For example, Risjord seeks to distinguish between matters handled by himself personally as opposed to those handled by his firm (an invalid distinction; see Pet. Op. Br., p. 3); purports to disassociate himself from Home Indemnity Company, which he suggests (erroneously; see Pet. Op. Br., p. 44) was the Home entity insuring Firestone;[4] and employs such self-serving adjectives as "minimal" to describe the various matters (other than *Cannova*) in which the Risjord firm has "periodically" (A. 90-91) acted as Home's attorneys over the years.

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[4]Elsewhere in Risjord's Brief it is now acknowledged that Risjord's purported distinction is invalid. (Resp. Br., p. 36).

ARGUMENT.

I.

AN ORDER DENYING A MOTION TO DISQUALIFY COUNSEL QUALIFIES FOR APPEAL UNDER THE COLLATERAL ORDER DOCTRINE.

A. An Order Denying a Motion to Disqualify Counsel Satisfies the *Cohen* Criteria for Finality.[5]

Coopers & Lybrand v. Livesay, Cited by Risjord, Does not Support His Position Here.

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), repeatedly cited by Risjord, does not support his position here. In *Coopers & Lybrand,* the Court addresses the appealability of a determination that an action may not be maintained as a class action. While holding that such an order was not appealable under *Cohen* (on the ground, *inter alia,* that class action determinations are enmeshed with the merits), the Court devoted its attention primarily to rejection of the "death knell" doctrine, a distinct doctrine which had been applied by some lower courts in the class action context but which (unlike *Cohen*) had not been sanctioned by this Court. The language cited by Risjord is taken largely from the Court's criticism of the "death knell" doctrine[6] and is inapposite here.[7]

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[5]While we do not urge that appeals be limited to a particular type of case, if such an approach were adopted we submit that cases such as the present one (involving the duty of undivided loyalty) are particularly suited for appeal, since the issues they pose are likely to be especially clear-cut.

[6]Risjord also cites the discussion in *Coopers & Lybrand* of *Gillespie v. U. S. Steel Corp.*, 379 U.S. 148 (1964), but that discussion likewise was not directed to the *Cohen* doctrine.

[7]The situation here also is not analogous to that in *United States v. MacDonald,* 435 U.S. 850 (1978), cited by Risjord. In *MacDonald,* involving the appealability of an order denying a motion to dismiss a criminal case for alleged violation of defendant's right to a speedy trial, the Court (after noting the special need for limiting appeals in the *criminal* context) cited several factors (not present here) which precluded appeal. These included: (1) the close connection between the issues raised on such a motion and the merits of the case: (2) the fact that any undue delay would have occurred *prior to trial* and hence the trial itself would not enhance any claimed deprivation: (3) the need to assess the impact of any alleged delay after trial and consequent tentative

Risjord's Proposed Test of "Importance" Is Unduly Restrictive.

Risjord urges that *Cohen* requires that the order appealed from be addressed to potentially decisive legal issues and that orders denying disqualification fail to meet this test because they require resolution on a "case-by-case" basis. While the present case meets even Risjord's supposed test (see Pet. Op. Br., pp. 19-20), as noted in our Opening Brief (p. 19), that test is unduly restrictive.[8] Moreover, no such test is applied to preclude review of orders *granting* disqualification.

Insofar as Risjord argues that the existence of "discretion" in ruling on disqualification orders precludes review under *Cohen*:

(1) The "abuse of discretion" standard to which Risjord adverts is by no means universally accepted in this area[9] and would be inapposite in any event under circumstances such as are here presented (see p. 8, *infra*). But, irrespective of the semantics employed in describing the standard of review in a given case, the factors cited in our Opening Brief (*e.g.*, the special importance of such orders not only in terms of their impact upon the losing party but also in terms of the serious questions of public policy they address) dictate that immediate review be afforded so as to monitor

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nature of any pretrial determination of that question; and (4) the fact that an acquittal would fully vindicate the interests to be served. The inapplicability here of factors (1), (2) and (4) is apparent; the inapplicability of factor (3) is discussed at page 18 of our Opening Brief.

[8]Risjord (p. 14) cites *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), as supposedly laying down a four-fold test including resolution of "an important issue which does not merely involve the exercise of discretion." But the passage cited by Risjord from that case does not in fact lay down such a requirement.

[9]See, *e.g.*, *Aetna Casualty and Surety Co. v. United States*, 570 F.2d 1197, 1200 (4th Cir. 1978):

"We are inclined to agree with the Fifth Circuit that '[i]n disqualification cases such as this, where the facts are not in dispute, District Courts enjoy no particular functional advantage over appellate courts in their formulation and application of ethical norms,' and that it is appropriate for us 'to determine whether the District Court's disqualification order was predicated upon a proper understanding of applicable ethical principles.' "

transgressions. Insofar as the real thrust of Risjord's argument is that the trial court ought to be the final arbiter, this circular reasoning assumes the very point at issue. Nor is Risjord's assumption of trial court infallibility a credible one. (see Pet. Op. Br., p. 24.)

(2) The generally accepted propriety of appeals from orders *granting* disqualification undermines this contention, unless it be contended that the trial court's "discretion" may be exercised only in one direction.

B. Appealability of Orders Denying Disqualification Is Consistent With Sound Judicial Policy.

Risjord's assertions of abuse are premised on fallacious assumptions as to the volume and delaying effect of appeals from denials of disqualification. See, *e.g.*, *Silberman v. Bogle*, 486 F.Supp. 70, 72 (E.D. Pa. 1980) (trial Court can and will proceed with discovery despite pending appeal from order denying disqualification). In this regard, we take issue with the Addendum to Risjord's Brief, which purports to list some 105 appeals in disqualification matters by way of a purported demonstration of the quantum of appeals at issue here. While even a total of 105 appeals over the span of years encompassed in Risjord's list would not be as impressive as Risjord's argument suggests, Risjord's list is grossly inflated. For example:

1. Risjord includes appeals from orders *granting* disqualification. Indeed, the only case listed from the First Circuit and five of the six cases listed from the Fourth Circuit are described by Risjord as appeals from orders *granting* disqualification.

2. Risjord's list includes writ proceedings. (See, *e.g.*, *Chugach Electric Association v. U. S. District Court for District of Alaska at Anchorage*, 370 F.2d 441 (9th Cir. 1966).

3. Risjord includes post-judgment appeals (see, *e.g.*, *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556 (2nd Cir. 1970); *U.S. v. McFaddin Express, Inc.*, 310 F.2d 799 (2nd

Cir. 1962)) and one or more appeals under 28 U.S.C. §1292(b) (see, *e.g.*, *Trone v. Smith*, 553 F.2d 1207 (9th Cir. 1977)).

4. Risjord's list includes cases involving situations extraneous to the question with which we are here concerned.[10]

5. Risjord's list contains duplications; *i.e.*, the same matter is cited in successive stages. See, *e.g.*, Second Circuit items 17 and 21.

Finally, Risjord's list does not take account of the fact that a substantial percentage of appeals from orders denying disqualification have resulted in reversals. (See Pet. Op. Br., p. 24). See also *Cheng v. GAF Corp.*, ... F.2d .... (2d Cir. No. 80-7254, August 26, 1980) (order denying disqualification reversed). For example, of the cases cited by Risjord from the Seventh Circuit, 4 orders denying disqualification were affirmed,[11] two such orders were reversed,[12] while the remaining case cited (*Weigel v. Shapiro*,

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[10]See, *e.g.*, *Lefrak v. Arabian American Oil Company*, 527 F.2d 1136 (2nd Cir. 1975) (alleged improper solicitation of clients; *In Re Fine Paper Antitrust Litigation*, 617 F.2d 22 (3rd Cir. 1980) (class counsel); *North American Acceptance Corp. Securities Cases v. Arnall, Golden & Gregory*, 597 F.2d 591 (5th Cir. 1979) (same); *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102 (5th Cir. 1978) (same); *Silberline Manufacturing Co. v. International Nickel Co.*, 569 F.2d 1217 (3rd Cir. 1977) (discovery order); *Glenn v. Arkansas Best Corporation*, 525 F.2d 1216 (5th Cir. 1975) (counsel in derivative action).

[11]*Novo Terapeutisk Laboratorium v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186 (7th Cir. 1979); *In re Special February 1977 Grand Jury*, 581 F.2d 1262 (7th Cir. 1978); *Whiting Corp. v. White Machinery Corp.*, 567 F.2d 713 (7th Cir. 1977); *Woodmar Realty Company v. McLean*, 294 F.2d 785 (7th Cir. 1961)

[12]*Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978); *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978).

608 F.2d 268 (7th Cir. 1979)) did not reach the merits of the disqualification question.[13]

II.

THE CONFLICT DISCLOSED BY THE PRESENT RECORD REQUIRES THAT ATTORNEY RISJORD BE DISQUALIFIED.

A. The "Consent" Approach Adopted Below Was Inherently Unsound.

The Trial Court's Action Cannot Be Sustained as a Proper Exercise of Discretion.

While the propriety of applying an "abuse of discretion" standard in reviewing a motion to disqualify is itself a subject of dispute (see p. 5, *supra*), in the present case the trial court's action could not be sustained as a proper exercise of discretion in any event. The basic facts were essentially undisputed and the trial court itself found a likelihood that the exercise of Risjord's independent professional judgment would be adversely affected by his differing interests. Unfortunately, the trial court failed to address the full implications of that finding or to take meaningful corrective action. That failure cannot plausibly be viewed as an exercise of "discretion".[14]

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[13]It should be noted that the percentage of affirmances cited here (57%) is less than on the cited Seventh Circuit appeals from orders granting disqualification, of which two were affirmed (*Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976) and *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 571 F.2d 390 (7th Cir. 1978) (the latter case actually involving a question of post-disqualification access to work product)) and the remaining case (*Rice v. Rice Foundation*, 610 F.2d 471 (7th Cir. 1979)) was remanded for further consideration (*i.e.*, a 67% affirmance rate). These figures hardly argue for a rule precluding appeals from orders denying disqualification as contrasted with the generally accepted rule allowing appeals from orders granting disqualification.

[14]In *Waters v. Western Co. of North America*, 436 F.2d 1072 (10th Cir. 1971), repeatedly cited by Risjord, the appellate court actually dismissed for lack of an adequate record and by reason of the request of the appellant's private counsel (as opposed to his insurance carrier-designated counsel) that the appeal be dismissed.

The Rule Cited by Risjord Involving Trial and Appellate Concurral in Resolving Disputed Facts Is Inapplicable Here.

This is not a case in which the trial and appellate courts have concurred in resolving a factual dispute, in which event this Court might understandably be reluctant to upset their determination. As previously noted, the trial court here itself recognized that the basic facts were essentially undisputed (A. 157), found a conflict of interests (A. 160), and then simply failed to take appropriate action. The court of appeals, in turn, hobbled by its approach to the appealability question, failed to address the merits in a meaningful fashion. Under the circumstances, there is no occasion for the deference urged by Risjord.

Extraneous Factors Cited by Risjord Cannot Aid His Position Here.[15]

The conflict with which we are here concerned does not depend upon any threatened breach of confidentiality. Accordingly, Risjord's assertion of a lack of subject matter nexus between the present case and those in which he and his firm have represented Home over the past twenty years (*e.g.*, that they did not involve defense of Firestone or similar liability insureds) is beside the point, as is Risjord's claim that there has been no proof that Home has turned over information to Risjord.

It is likewise unnecessary here to determine whether Risjord's intentional tort theory was in fact conceived for sinister motives.[16] Regardless of its genesis, given Risjord's

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[15]The extraneous matters in Risjord's Brief also include some gratuitous insults of various Firestone counsel and affiants, to which we do not propose to respond.

[16]Implicit in much of Risjord's argument is the notion that disqualification cases necessarily fall into two groups: *i.e.*, those involving actual dishonesty by counsel and those involving mere surface irregularities of no real moment. Actually, account also must be taken of cases (like the present) in which the conflict by its very nature precludes the affected attorney from approaching his task with the requisite detachment and single-minded loyalty. In such cases, the conflict must be viewed as tainting the proceedings *per se*. Viewed in this context, expressed concerns about an "appearance of impropriety" are seen as reflecting not mere surface concerns but a realistic recognition that one cannot and need not probe the actual thought processes of counsel to conclude that disqualification is in order.

awareness of Home's stake in the success of that theory (as opposed to those Risjord acknowledges are indisputably covered by Home's policy), his longstanding relationship with Home (and the expectation of future business inevitably flowing therefrom) and the tactical and strategic choices he inevitably will confront as counsel for the Risjord Plaintiffs, Risjord simply cannot approach his task with the same detachment and undivided loyalty as an attorney freed of his differing interests.

The conflict in which Risjord is thus inextricably intertwined is by no means a mere technical one, as Risjord would suggest. It goes to the essence of the proceeding and, to use a phrase favored by Risjord, will "taint the underlying trial".[17]

The Deficiencies in the Consents Risjord Filed Point Up the Impracticability of the Trial Court's Solution.

Risjord's belated suggestion that Firestone should have raised the inadequacies of the purported consents[18] in the trial court misconceives the thrust of Firestone's position. Since Firestone disputed the viability of the trial court's consent approach *per se*, no useful purpose could have been served in terms of Firestone's appeal by debating the contents of the consents in the trial court.

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[17]Risjord's suggestion that the present case does not fit neatly into one of the two categories of "taint" cited in *Board of Equalization v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979), merely attests to the oversimplification inherent in such conceptual "pigeonholes".

[18]In an apparent effort to excuse the failure of Home and the Risjord Plaintiffs to consent to Risjord's dual representation, Risjord asserts that neither could consent to Risjord's representation of the other, but Risjord fails to explain why they would be unable to do so. Indeed, the fallacy in Risjord's assertion is pointed up by *Yarn Processing*, 530 F.2d 83 (5th Cir. 1976) a case cited by Risjord himself, where the court refers to "consent to the employment of the attorney by an adverse party . . ." 530 F.2d 89.

The Cases Cited by Risjord Do Not Support His Position Here.

In *I.B.M. Corp. v. Levin*, 579 F.2d 271 (3d Cir. 1978), the court *disqualified* counsel, and the court's statement that "at the very least" fully informed consent would have been required must be viewed in that light. Moreover, the case involved parties far more sophisticated than the Risjord Plaintiffs and was devoid of the special concerns and dangers posed by the multi-faceted conflict here — *e.g.*, an additional affected non-consenting interest (Firestone). Nor was the standard of disclosure voiced in *Levin* satisfied here. See Pet. Op. Br., p. 41.

Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976) again *affirmed a disqualification order*; the court's oblique reference to "consent" not only falls far short of a ringing endorsement (see Pet Op. Br., p. 41) but alludes to "consent of all concerned", which in the present context would include Firestone. The additional comments above regarding *Levin* also apply here.

Messing v. FDI, Inc., 439 F.Supp. 776 (D.N.J. 1977), merely involved the question of joint representation of sophisticated co-defendants whose interests might diverge, while *Acorn Printing Co. v. Brown*, 385 S.W.2d 812 (Mo.App.1964), (discussed at page 15, note 22 *infra*) was not remotely similar on its facts.

B. Neither Home's Purported Discharge of Risjord In *Cannova* Nor the Subsequent Dismissal of that Case Obviate the Need to Disqualify Risjord.

In a belated attempt to salvage Risjord, Home purported to discharge him as its attorney in the *Cannova* case (A. 190), but neither that gesture, nor the subsequent dismissal of *Cannova* to which Risjord now adverts, serves to cure the conflict of interests in which Risjord has become enmeshed or to obviate the need for his disqualification. The relationship between Risjord and Home is long-standing and

deeply rooted. It far transcends Risjord's involvement in *Cannova. It extends over a period of some twenty years, during which the Risjord firm has represented Home in a number of matters and consistently held Home out to the public as their foremost insurance client* (A. 90-91, 98-99, 100-102, 105-106). Given the depth and permanence of the Risjord-Home relationship, Home's gesture in purporting to jettison Risjord in a single lawsuit cannot be viewed realistically as severing the ties that have bound Home and Risjord together for two decades.

Irrespective whether Risjord may be handling a particular case at a given point in time,[19] Risjord must inevitably be aware that his firm's potential future business with this long-standing client might well depend on the extent his actions tended to aid or hinder that client's efforts to defeat coverage on the claims of the Risjord's Plaintiffs. Indeed, the very fact that the Risjord firm admittedly has been handling matters for Home *for twenty years on a case-by-case basis* undermines Risjord's effort to seek comfort from any claimed interlude conveniently coinciding with the present appellate proceedings.

Turning to the cases cited by Risjord, each is readily distinguishable.

In *Whiting Corporation v. White Machinery Corp.*, 567 F.2d 713 (7th Cir. 1977), plaintiff's counsel merely acted as attorneys for a *minority shareholder* of defendant, a situation not remotely similar to the present case.

In *Moritz v. Medical Protective Co.*, 428 F.Supp. 865 (W.D. Wisc. 1977), the attorney's proposed withdrawal was directed not to the *insurer* (Medical Protective Co.) but to the *individual* (Moritz) he had been assigned to represent

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[19]Risjord cites the Affidavit of one Larry Wagner as stating that the *Cannova* case was "the only case handled by Risjord"; actually Mr. Wagner merely refers to *Cannova* as the only case in which the Risjord firm was employed by Home at that particular point in time. (A. 170-171.)

in a single (state court) case, and to whom he occupied no overall relationship akin to that of Risjord to Home. Nor did the case pose a situation akin to that presented by the multi-faceted conflict in the instant case. Even in that context, the district court did not sanction the withdrawal, but left the matter for determination by the state court in which the suit in question was pending, ruling that if the state court declined to sanction that withdrawal, Moritz's motion to disqualify the attorney in the district court suit would be deemed granted.

In *Wong v. Fong*, 593 P.2d 386 (Sup.Ct. Hawaii, 1979) the appellate court initially undertook to review by mandamus the trial court's action permitting the law firm representing A (by designation of A's insurer) in a malpractice case to withdraw in order to represent B in an unrelated action against A. But when it developed that the malpractice suit had been settled and dismissed, the firm was permitted to represent B. The distinguishing factors noted with respect to *Moritz* (*e.g.*, the lack of a long-standing relationship between A and the law firm in question and of ongoing dangers akin to those in the present case) are apposite here as well.

C. Risjord's Belated Challenge to Firestone's Standing Is Not Well Taken.

In the Court of Appeals, Risjord raised an argument not advanced by him in the trial court, *i.e.*, that Firestone lacks standing to seek his disqualification.

Perhaps the simplest answer to this challenge to standing is found in the authorities deriving standing from the duty

of any attorney to bring such matters to the court's attention.[20]

But it is not necessary here to rely on this doctrine, for it is clear that Firestone is not a mere interloper; it has a vital interest in avoiding the dangers posed by permitting an attorney linked to its insurer Home[21] to control the course of lawsuits in which Home is seeking to avoid coverage.

In so doing, it is entirely proper for Firestone to call the Court's attention to the fact that in the present context, the linkage between attorney Risjord and Home not only poses risks to Firestone (as Home's insured), but also creates an appearance of impropriety in terms of Risjord's relationship to the Risjord Plaintiffs, insofar as his loyalty to them may be or appear to be diluted by a concern, conscious or unconscious, for Home's interests in defeating coverage.

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[20]See, *e.g.*, *In re Gopman*, 531 F.2d 262, 265 (5th Cir. 1976); *Brown & Williamson Tobacco Corp. v. Daniel International Corp.*, 563 F.2d 671, 673 (5th Cir. 1977). *Cf. General Motors Corp. v. City of New York*, 501 F.2d 639, 651-52 (2d Cir. 1974); *Estates Theatres, Inc. v. Columbia Pictures Industries, Inc.*, 345 F.Supp. 93, 98 (S.D.N.Y. 1972); *United States v. Turkish*, 470 F.Supp. 903, 909 (S.D.N.Y. 1978). See also *Messing v. F.D.I., Inc.*, 439 F.Supp. 776 (D.N.J. 1977) (cited by Risjord in another context) where the court held that defendant A had standing to challenge a conflict arising from the same counsel representing various other parties, notwithstanding A was not itself a client of the challenged counsel).

[21]The fact that the Home policy is one of excess coverage, in which Firestone ordinarily handles its own defense, reinforces Firestone's right to a voice in the disqualification proceedings.

Moreover, we take issue with Risjord's assertion that Home owed no fiduciary obligations to Firestone, nor do the cases cited by Risjord support that claim. *Craig v. Iowa Kemper Mutual Ins. Co.*, 565 S.W.2d 716 (Mo.App. 1978), merely declined to find such a relationship in the special context of uninsured motorist coverage, while *Chavez v. Chenoweth*, 89 N.Mex. 423, 553 P.2d 703 (1976) states that the existence *vel non* of a fiduciary obligation to the insured must be determined in light of the particular factual context in which the question arises. Such a duty plainly existed in this case insofar as Home was in a position to affect Risjord's retention as counsel for plaintiffs and thereby to control the course of the litigation. And insofar as Home failed to act in a manner consistent with those duties, Firestone cannot reasonably be foreclosed from acting on its own behalf.

In urging the contrary, Risjord suggests that it is Home, rather than Firestone, that ought to be entrusted with the decision whether or not to seek Risjord's disqualification. But in a context in which Home may stand to benefit from the very division of loyalties in question, such a view is utterly unrealistic. Nor can the personal injury plaintiffs Risjord represents be expected to appreciate fully the dangers posed in the relatively sophisticated context of the instant case. Certainly the courts should not be powerless to vindicate the public interest here merely because the conflict is more complex than that usually encountered.[22]

D. Risjord's "*In Terrorem*" Argument Is Unsound.

We wish to dispel Risjord's suggestion that his disqualification *per se* would preclude any attorney who ever represented Home from suing anyone ever insured by Home. The disqualification here sought turns on a special combination of facts: an attorney with a longstanding and deeply rooted relationship to an insurer suing its insured on a theory which the insurer cites as a ground for avoiding coverage.

E. Risjord's Suggestions of Harassment and Delay Are Unfounded.

The simplest answer to Risjord's claim that Firestone's motion to disqualify him is merely designed for harassment

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[22]Nor do the cases cited by Risjord support his position. *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83 (5th Cir. 1976) involved the effect of past representation of a former client, with preservation of client confidences the focal point of inquiry and the former client's failure to object viewed as evidencing a lack of concern on that score. Where, as in the present case, the conflict is of the "open and obvious" type, the *Yarn Processing* court itself recognized that a narrow approach to standing would be inappropriate.

In *Payne v. St. Louis Grain Corp.*, 562 S.W.2d 102 (Mo.App. 1977) the court noted that the complaining party A failed to indicate how it might be adversely affected by the fact the attorney for party B previously had represented party C.

In *Acorn Printing Co. v. Brown*, 385 S.W.2d 812 (Mo.App. 1964), third party defendant A knowingly engaged the same attorney who represented plaintiff B; after a judgment adverse to A, A sought to set aside the judgment on the basis of a claimed conflict.

is that the trial court itself not only found Firestone's concerns to be well taken but took pains to endorse Firestone's present appeal and the substantiality of the question it poses (A. 160). Nor has Firestone sought to delay the progress of discovery pending the resolution of that question, a factor further evidencing Firestone's good faith.[23] Moreover, the uncontradicted facts of record attest to the legitimacy of Firestone's concerns.[24]

F. *Hale* is Within the Ambit of the Motion to Disqualify.

Firestone's motion sought to disqualify Risjord, *inter alia*, in rim cases in which information obtained from Home

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[23]While Risjord asserts that Firestone moved to disqualify Risjord after he was designated lead and liaison counsel at the first pretrial conference (held March 29, 1979), actually Firestone had declared its intention to so move in its Suggested Plan for the First Pretrial Conference, filed March 26, 1979, prior to Risjord's being so designated. (Pet. Proposed Supp. Record) (Firestone has moved to augment the record by adding this item from the trial court record. In view of the pro forma nature of the motion (which it is anticipated will be unopposed) it appears inappropriate to defer filing the Reply Brief pending formal action by the Court.)

[24]Nor is there merit to Risjord's argument, first urged on appeal, that Firestone is guilty of laches. In essence, Risjord contends that Firestone should have known of Risjord's relationship to Home at the time he filed suit on behalf of the Risjord Plaintiffs because William Sanders (Firestone's liaison counsel in this multi-district litigation) had been engaged by Risjord's errors and omissions insurer some years ago to defend Risjord against a libel charge asserted against Risjord in the *Cannova* suit (The libel claim was disposed of by summary judgment). (A. 93). There is no suggestion Mr. Sanders had been aware of the continuing and deep-rooted nature of the Home-Risjord relationship. Nor does Risjord suggest wherein Firestone could be charged with knowledge allegedly acquired by Mr. Sanders in another context. Moreover, the multi-faceted conflict in which Risjord was involved could not have become apparent prior to the time Home disavowed liability to Firestone on the intentional tort claims of the Risjord Plaintiffs. And Risjord's own delay in urging the point and his failure to demonstrate any prejudice militate against it in any event. Nor are laches claims lightly entertained in the present context, given the public interest considerations involved. See, e.g., *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973) (three-year delay not fatal).

could be useful to plaintiffs. (A. 104). *Hale* clearly falls within that description, since it involves a subject matter (rims) as to which Firestone has imparted data to Home as its insurer (A. 112) and the danger alluded to in the motion exists irrespective whether Firestone can prove that Home actually transmitted information to Risjord.[25]

While Risjord's argument therefore rests on a false premise, there is an even more important reason for rejecting it. Because of the obvious interrelationship of the four Risjord cases (the complaints generally follow the same format), Risjord's strategy and actions in *Hale* must inevitably be colored by his approach in *Butler, Goodwin*, and *Rodriguez* and by his awareness that the course he follows in *Hale* will tend to aid or hinder Home's position in *Butler, Goodwin* and *Rodriguez*.

Indeed, Risjord himself secured purported consents from the *Hale* plaintiffs as well as from those in *Butler, Goodwin and Rodriguez*. (A. 167.) Nor has Risjord heretofore challenged Firestone's position in this respect.

G. A True Concern for Plaintiffs' Rights Dictates That Risjord Be Disqualified.

Risjord's professed concern for plaintiffs' rights appears misplaced. For the danger that Risjord will guide the cases so as to further (or at the very least so as not to hinder) the efforts of his client Home to defeat coverage poses a threat not only to Firestone but also to the Risjord Plaintiffs, who are entitled to representation by counsel whose loyalty is

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[25]Those concerns are by no means fanciful. For example, a memorandum in the files of the Insurance Institute for Highway Safety disclosed that Risjord had provided that organization with documents consisting largely of "communications between various wheel manufacturers and their insurors." (R. 259)

not impaired by such considerations.[26] Stated otherwise, what ought to concern this Court is not the fact that plaintiffs selected Risjord (and, being insufficiently sophisticated or informed to appreciate the dangers, may have acquiesced in his retention), but the fact that Home, whose motives are hardly above suspicion, is demonstrably eager to have him in the case.

These concerns cannot be dispelled merely by the alleged volume of Risjord's activity, as the question remains: To what extent may that activity reflect the double burden of serving two masters, or at least be colored by Home's interests?[27] In short, the basic problem here must be perceived not merely in terms of the degree of Risjord's "vigor" (or lack thereof) but rather in terms of the danger that any such "vigor" may be directed, consciously or unconsciously, to Home's ends.

Nor will Risjord's replacement adversely affect any legitimate interests of the plaintiffs he now represents. Certainly there are ample competent plaintiffs' counsel without linkage to Home available to prosecute plaintiffs' cases[28] free of the ethical concerns posed by Risjord's retention.[29]

In essence, the real dichotomy in these proceedings lies not between Firestone and plaintiffs, but between Risjord

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[26]While Risjord expounds on the alleged benefits of his approach to discovery, that approach has not been viewed with unanimous approval. See, *e.g.*, *Covill v. Phillips*, 452 F.Supp. 224, 239 (D. Kans. 1978), where the court describes Risjord's conduct in the course of discovery as "reprehensible" and as generating "distrust and acrimony".

[27]It can hardly be assumed that "more is better"; for example, Risjord might be tempted to overtry his case to afford Home at least an opportunity to dispute coverage.

[28]Indeed, it seems likely that most plaintiffs' counsel would be free from such ties to an insurer.

[29]While Risjord urges that his pursuit of a variety of theories is necessarily in plaintiffs' interests, the benefits of such a "shotgun" approach over more traditional ones are not self-evident; in any event, the tactical and strategic choices which inevitably will arise in that pursuit (*e.g.*, in terms of relative emphasis or the possible jettison of one line of approach to strengthen another,) are by no means obvious.

and Home on the one hand, and on the other hand Firestone, the plaintiffs, and the need to protect the public confidence in the judicial system. The choice between those interests cannot admit of serious doubt.

Conclusion.

Risjord's response fails to dispel the two central conclusions which the present record impels: (1) the trial court's order denying disqualification was appealable; and (2) the conflict which Risjord inevitably confronts requires that he be disqualified.

Respectfully submitted,

HARVEY M. GROSSMAN,
Attorney for Petitioner.

Of Counsel:

WILLIAM FREIVOGEL,
ROSS, HARDIES, O'KEEFE,
BABCOCK & PARSONS,
and
WILLIAM H. SANDERS,
BLACKWELL, SANDERS, MATHENY,
WEARY & LOMBARDI.